IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-529

WES WISE, ET AL.,

Petitioners

v.

ALBERT L. LIPSCOMB, ET AL.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James A. Johnston
JOHNSTON, LARSON & DIXON
Suite 1002, Main Bank Building
Dallas, Texas 75202
(214) 742-3847

Edward B. Cloutman, III
MULLINAX, WELLS, MAUZY & BAAB, INC.
Suite 200, 8204 Elmbrook
Dallas, Texas 75247
(214) 630-3672

Walter L. Irvin
555 Griffin Square
Dallas, Texas 75202
(214) 744-5994

Samuel Foutz
DALLAS LEGAL SERVICES FOUNDATION, INC.
914 Commerce, 2nd Floor
Dallas, Texas 75202
(214) 742-1631

Attorneys for Respondents

SUBJECT INDEX

	Page
Table of Authorities.....	ii.
Statement of the Case.....	1
Reasons for Denying the Writ.....	2
Conclusion.....	6

TABLE OF AUTHORITIES

Cases Cited	Page
Burns v. Richardson, 384 U.S. 73 (1966).....	4
Connor v. Johnson, 402 U.S. 690 (1971).....	3
East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639 (1976).....	2,4,6
Mahan v. Howell, 410 U.S. 315 (1973).....	6
Reynolds v. Sims, 377 U.S. 533, 586 (1964).....	3,4
Wallace v. House, 515 F.2d 619 (5th Cir. 1975).	3,4

STATEMENT OF THE CASE

Respondents dispute the contention of Petitioners that subsequent to a finding of the trial court's determination that the at-large election scheme was unconstitutional that the City Council reapportioned itself, adopting the eight single-member, three at-large election scheme now challenged. In fact, on January 17, 1975, after a lengthy hearing during which the City of Dallas vigorously defended its existing at-large election scheme, the trial court found such system unconstitutional and ordered the City Council to present a constitutional plan for the Court's consideration. (Appendix B, p. B-3). The City Council then adopted a resolution directing the City Attorney to advise the trial court that it was its intention to adopt the eight - three plan now at issue. (Appendix A, p. A-1). Subsequently, an ordinance was passed specifically stating that "[a]s a result of the decision of the United States District Court for the Northern District of Texas .... and this Ordinance enacted pursuant thereto," the present election scheme was adopted. (Appendix A, p. A-2). A hearing was held on February 8, 1975, during which several plans were presented for the trial court's consideration. At that time the trial court ordered that the plan offered by the City Council be instituted. (Appendix B, p. B-27). Thus, it is inaccurate to contend that the City Council reapportioned itself. In fact, the City Council is legally unable to reapportion

itself. The election system is established by City Charter, and can only be amended by a majority vote of registered voters. The City Council cannot on its own modify the Charter to alter the election system. (Appendix B, p. B-31).

REASONS FOR REFUSING THE WRIT

1) THE COURT OF APPEALS ADOPTED THE CORRECT AND PREVAILING LEGAL STANDARD IN HOLDING THAT THE EIGHT - THREE PLAN ADOPTED BY THE TRIAL COURT WAS IMPROPER.

Respondents contend that the decision of the United States Court of Appeals for the Fifth Circuit accurately applies the federal common law of voting rights remedies. That standard was recently expressed in East Carroll Parish School Board v. Marshall, 424 US 636, 639, (1976) as follows:

> We have frequently reaffirmed the rule that when United States District Courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances.

The specific facts in East Carroll are remarkably similar to the instant case. In that case, a white resident of the parish challenged population disparities among the wards of the parish. After a hearing, the district court agreed, and adopted an at-large reapportionment plan suggested by the parish police jury. Subsequently, new hearings were held after the 1970 census. The police jury submitted an at-large plan. Stewart Marshall, a black citizen of the parish was permitted to intervene. Marshall

contended that at-large elections diluted the black vote. The District Court adopted the at-large plan presented by the parish, and found that the at-large plan would not diminish the black voting strength. An en banc panel of the Fifth Circuit reversed the trial court finding of no dilution of black voting strength and rejected the use of the at-large plan on constitutional grounds. The Supreme Court affirmed without expressing approval of the constitutional views of the Fifth Circuit, but rather restating the rule of Connor v. Johnson, 402 U.S. 690 (1971) as expressed above.

A similar expression of the Supreme Court's application of the federal law of voting rights remedies can be seen in the history of Wallace v. House, 515 F.2d 619 (5th Cir. 1975), vacated and remanded, 425 U.S. 947 (1976), on remand 538 F.2d 1138 (5th Cir. 1976). In that case, the trial court determined that an all-at-large aldermanic election scheme in the City of Ferriday, Louisiana, unconstitutionally diluted the votes of the black citizens of the town. The trial court invited the Board of Aldermen and the plaintiffs to present plans for the court's consideration. The trial court rejected the Board's plan because it contained an at-large seat and adopted the plaintiffs' plan, which called for all single-member districts. Wallace v. House, 515 F.2d 619, 622, supra. The Fifth Circuit reversed, relying in part on the statement in Reynolds v. Sims, 377 U.S. 533, 586 (1964), that legislative apportionment is a matter for legislative determination, and the legislature must be given an opportunity to fashion a remedy. The United States

Supreme Court granted the petition for writ of certiorari, vacated the judgment and remanded the case in light of East Carroll Parish School Board v. Marshall, supra. On remand, the Fifth Circuit found that no special circumstances were found in the record to justify a holding that the trial court abused its discretion, and affirmed the trial court's all-single-member district plan. Wallace v. House, 538 F.2d 1136, supra.

Thus, both Wallace and East Carroll Parish have followed a course of litigation remarkably similar to the instant case. The uniform response of the Supreme Court has been to require that plans adopted by the courts be single-member plans absent unusual circumstances.

Petitioners' reliance on Reynolds v. Sims, supra, and Burns v. Richardson, 384 U.S. 73 (1966) is inappropriate to the facts now before this Court. In these earlier cases, there had been no evidence that multi-member districting had the effect of diluting racial minority voting strength. In the instant case, there was overwhelming evidence of this effect, so much so, in fact, that it was immediately suspect when the City Council presented a plan containing three at-large places. Also, these earlier cases involved bicameral state legislatures, with problems of federalism not present when cities are involved. See Burns v. Richardson, supra, p. 99 (J. Stewart, concurring). Finally, unlike a state legislature, the City Council itself had no power to reapportion itself. That could only be done by the voters of the City.

Clearly, then, the Court of Appeals in this case has followed with precision the federal common law of voting rights remedies as it has been developed by this Supreme Court.

2) THE COURT OF APPEALS CORRECTLY HELD THAT MEXICAN-AMERICANS DID NOT CREATE A SPECIAL CIRCUMSTANCE JUSTIFYING THE EIGHT - THREE PLAN.

The Mexican-American population in the City of Dallas comprises less than ten percent of the City's population and this housing pattern is such that they are spread throughout the city limits. (Appendix B, p. B-3). The trial court was itself ambivalent about the role of Mexican-Americans in any election system. The trial court found that Mexican-Americans had suffered some restrictions of access to the political processes but that those restrictions did not amount to dilution. (Appendix D, p. D-7). The trial court concluded that Mexican-Americans benefited from an at-large system. (Appendix D, p. D-7). Importantly, the Mexican-American intervenors in the lawsuit rejected the eight - three plan adopted by the trial court, and pointed to election results had under the eight - three plan to support their contention that at-large voting, in fact, diluted the voting strength of Mexican-Americans. (Appendix D, p. D-9).

The Court of Appeals found that under any theory, Mexican-Americans in the City of Dallas would fare as well, if not better, under a single-member system.

This is certainly the only reasonable conclusion that can be drawn from the evidence, and certainly negates any argument that Mexican-Americans are a special circumstance sufficient to justify the

at large features of the plan.

3) THE NEED FOR CITY-WIDE PERSPECTIVE CANNOT BE AN UNUSUAL CIRCUMSTANCE JUSTIFYING AN AT-LARGE ELECTION SCHEME.

The trial court attempted to justify the three at-large seats on the grounds that there was a need for a city-wide perspective on the council. (Appendix B, p. B-21). Regardless of whether or not this conclusion is supported in the record, it should be pointed out that the trial court made lengthy and detailed findings of the discriminatory aspects of life and politics in the City of Dallas experienced by minority black citizens. (Appendix B, p. B-4-9). The trial court found that the at-large election scheme restricted the access of black citizens to the political process. The court found that black voters vote for black candidates and that white voters vote for white candidates. (Appendix B, B-14). This being so, a "city-wide perspective" becomes an euphemism for the election of three white candidates. This is not the "unusual circumstance" contemplated in East Carroll Parish Police Jury, supra.

In fact, the only "unusual circumstance" cited by the Supreme Court for retaining at-large districts following a judicial finding of unconstitutionality was the close proximity of election day coupled with the lack of time to construct a single-member district. Mahan v. Howell, 410 U.S. 315 (1973)

CONCLUSION

Respondents respectfully pray that the petition for writ of certiorari to the United States Court of

Appeals be denied.

Respectfully submitted,

James A. Johnston
JOHNSTON, LARSON & DIXON
Suite 1002, Main Bank Building
Dallas, Texas 75202
(214) 742-3847

Edward B. Cloutman, III
MULLINAX, WELLS, MAUZY & BAAB, INC.
Suite 200, 8204 Elmbrook
Dallas, Texas 75247
(214) 630-3672

Walter L. Irvin
555 Griffin Square
Dallas, Texas 75202
(214) 744-5994

Samuel Foutz
DALLAS LEGAL SERVICES FOUNDATION, INC.
914 Commerce, 2nd Floor
Dallas, Texas 75202

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, James A. Johnston, certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on Lee Holt, Esq. and George Solares, Esq. on this the 4th day of November, 1977, by placing in a depository of the United States Postal Service two copies of the Brief, with first class postage prepaid, addressed to each of the attorneys named above at his post office address, in compliance with the United States Supreme Court Rule 33(1),(3)(b).

James A. Johnston